84-300

No. _____

Office-Supreme Court, U.S.
FILED
JUN 16 1984
ALEXANDER L. STEVAS,
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IN THE

Supreme Court of the United States

October Term, 1984

S. JEFFREY BESSER
Petitioner,

v.

CHARLOTTE GREENFIELD
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

S. Jeffrey Besser
Petitioner
In Pro Per

818 Felspar
Ridgecrest,
California 93555
619/375-3592

32 pp

QUESTION PRESENTED

Has Petitioner been deprived of due process of law because of the negligence, inability or refusal of a District Judge to timely hear a Motion for Extension of Time to File an Appeal (judge waited 45 days before granting motion)?

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IN THE

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S. JEFFREY BESSER
Petitioner,

v.

CHARLOTTE GREENFIELD
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

S. JEFFREY BESSER, the Petitioner herein prays that a Writ of Certiorari issue to review the Judgment of the Supreme Court of New Mexico entered on March 20, 1984 (No. 15,279).

OPINIONS BELOW

The Final Decree of Dissolution of Marriage; the Decision and Findings of Fact in No. DR 82-924 in the District Court of Dona Ana County, New Mexico; the Order Extending Time for Appeal; the Notice of Appeal; the New Mexico Court of Appeals Calendaring Notice of No. 7531 to the Summary Calendar; the Memorandum in Opposition to Summary Disposition to the Court of Appeals concerning case #7531; the Memorandum Opinion of the Court of Appeals of the State of New Mexico, No. 7531; the affidavit of E. H. Williams, then attorney for Petitioner filed on Nov. 18, 1983; the Petition for Writ of Certiorari in the Supreme Court of the State of New Mexico; the Decision No. 15,279 of the Supreme Court of the State of New Mexico; the Motion to Enlarge Time and the Affidavit in Support of the Motion to Enlarge Time filed with the New Mexico Supreme Court; the Motion for Rehearing filed with the New Mexico Supreme Court; and the denial of the Motion for Extension to file Motion for Rehearing and Motion for Rehearing by the New Mexico Supreme Court have been certified and transmitted to the Clerk of the Supreme Court of the United States. (Xerox copies of these motions, memoranda and decisions have been forwarded with this petition.)

The Decision of the District Court of Dona Ana County, No. DR 82-924 is found at Appendix A.

The Memorandum Opinion (decision) of the Court of Appeals of the State of New Mexico is found at Appendix B.

The Decision of the Supreme Court of the State of New Mexico is found at Appendix C.

The Decision on the Motion for Extension to File a Motion for Rehearing and Motion for Rehearing from the Supreme Court of the State of New Mexico is found at Appendix D.

JURISDICTION

The judgment of the Supreme Court of New Mexico was entered on March 20, 1984. The jurisdiction of this Court is invoked under 28 USC Section 1257 (3). The Motion for Extension to file Motion for Rehearing and Motion for Rehearing were denied by the Supreme Court of the State of New Mexico on July 13, 1984.

CONSTITUTIONAL PROVISIONS INVOLVED

Article IV, Section 34 of the Constitution of the State of New Mexico. Said provision reads as follows: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case."

Section I of the Fourteenth Amendment to the Constitution of the United States. Said section reads as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The federal due process question first arose in Petitioner's (then Respondent-Appellant's) Petition for Writ of Certiorari on page 6, paragraph 3, n:

> "n. Counsel for Respondent-Appellant, despite reasonable and diligent effort to obtain a hearing and as a result of conflicts in the Court's schedule and Petitioner-Appellee, was unable to obtain a hearing or an Order Extending the Time Within Which to Appeal. The Court's issuance of the Order of November 14, 1983, Extending the Time, demonstrates the Court's determination that the Motion to Extend Time was well taken, consequently, Respondent-Appellant has been deprived of his right of appeal and of due process of law resulting not only from the oversight of his attorney but also from the failure of the system to accommodate the requests for hearing of Respondent-Appellant and to act upon a pending Motion within forty-five (45) days from the date of its filing and in spite of two (2) written requests for hearing and the efforts of counsel for Respondent-Appellant by telephone to arrange a hearing and/or conference call."

The New Mexico Supreme Court quashed Petitioner's Writ of Certiorari, upholding the dismissal of Petitioner's appeal on the grounds that the trial court had not granted Petitioner's motion to extend time to appeal with the 60 days provided by Civ. App. Rule 3 (f), amended on January 1, 1983. The Motion for Extension of Time was filed on October 3, 1983. Petitioner's deprivation of due process occurred in further proceedings besides the trial judge's failure to hear the Motion within a reasonable period of time (Sept. 30 through Nov. 14). Due process was again denied by the Court of Appeal's failure to acknowledge the trial judge's verbal decision in a conference call (affidavits attached) on

Nov. 14, 1983, within the construed 60 day time limit. Due process was again denied by the Appellate Court's misapplication of Civ. App. Rule 202 and by the New Mexico Supreme Court's misapplication of Civ. App. Rule 3 (f). The language cited by both courts referred to rules or amendments enacted while Petitioner's case was pending and was, therefore, in violation of Article IV, Section 34 of the New Mexico State Constitution.

Petitioner moves this Court to allow his appeal on the following grounds:

1. The New Mexico Supreme Court quashed Petitioner's Writ of Certiorari, thereby upholding dismissal of the Petitioner's appeal on the grounds that the trial court had not granted Petitioner's motion to extend time to appeal within the 60 days provided by Civ. App. Rule 3 (f), amended on January 1, 1983.

2. The New Mexico Supreme Court specifically relied on the amendment added to Rule 3 (f) on January 1, 1983, citing the language: "Under Civ. App. Rule 3 (f), no motion for extension of time to file the notice of appeal may be granted after 60 days from the time the appealable order is entered."

3. The New Mexico Supreme Court held that Article IV, Section 34, of the constitution of the State of New Mexico and Marquez v. Wylie, 78 N.M. 544, 434 P2d 69 (1967), required the application of Rule 3 (f) rather than Civ. App. Rule 202 to the Petitioner's case, because Rule 202 became effective after the filing date in Petitioner's case.

4. The New Mexico Supreme Court overlooked the fact that the 60 day provision itself was added to Rule 3 (f) effective January 1, 1983, subsequent to the filing date in Petitioner's case of September 29, 1982.

5. The New Mexico Supreme Court applied Marquez

and Section 34 appropriately but not to the proper extent. Petitioner's case and the trial judge's jurisdiction to extend the time for Petitioner's notice of appeal should have been reviewed pursuant to Civ. App. Rule 3 (f) prior to the January 1, 1983 amendment.

6. Under Rule 3 (f) without the January 1, 1983 amendment (but with the September 1, 1975 amendment), the appellate courts ultimately had to decide whether an extension of time for filing an appeal should be granted: Montgomery Ward v. Larragoite, 81 N.M. 383, 467 P.2d, 399 (1970), White v. Singleton, 88 N.M. 262, 539 P.2d 1024 (Ct. App. 1975), Guess v. Gulf Insurance Co., 94 N.M. 139, 607 P.2d 1267 (1980) and 12 New Mexico Law Review 147 (1982). The January 1, 1983 amendment relied upon by the Court in this decision removed the ultimate authority from the appellate courts by making the issue jurisdictional and providing for an automatic denial of an appeal after the expiration of the 60 day period. Because the 60 day automatic denial encompassed in the January 1, 1983 amendment was passed while Petitioner's case was pending, the appellate court must still ultimately decide whether or not the extension should be granted and still retains jurisdiction to make that determination.

7. Under Rule 3 (f) without the January 1, 1983 amendment, the trial court's order extending the time for the Petitioner to file his notice of appeal was a valid order and the notice of appeal was effective (not automatically denied), and the appeal was improperly dismissed.

8. In applying Civ. App. Rule 3 (f) with the inapplicable January 1, 1983 amendment, the New Mexico Supreme Court overlooked the fact that the trial judge advised all parties concerned on November 14, 1983 (the 60th day) that he agreed to extend the time for filing the appeal. (See affidavit of E. H. Williams, then attorney for then Respondent-Appellant, S. Jeffrey Besser). Therefore, even under the inapplicable Rule 3 (f) with the January

1, 1983 amendment used by the New Mexico Supreme Court, Petitioner had obtained the granting of the extension within the 60 day period.

FACTS

a. A final Decree of Divorce was entered in this cause on September 15, 1983.

b. Petitioner filed a Motion for Extension of Time Within Which to File Notice of Appeal dated September 30, 1983, setting forth as grounds the inadvertance of counsel for Petitioner and the lack of knowledge of counsel for Petitioner and the lack of knowledge of counsel for Petitioner of the revision and enactment of N.M.S.A. 1978 Crim. Child. Ct., Dom. Rel. and WW/C App. R202 (a) (Repl. Pamp. 1983).

c. On September 30, 1983, concurrently with the filing of a Motion for Extension of Time, Petitioner, through his attorney, wrote a letter to Judge Hughes requesting a Hearing on the Motion for Extension of Time.

d. On or immediately preceeding October 13, 1983, trial counsel for the Respondent notified trial counsel for the Petitioner of the withdrawal of Respondent's counsel and of the fact that Respondent was handling all further proceedings in the matter. Counsel for Petitioner then ascertained from Respondent that she would not agree to the entry of an Order Extending Time for Appeal.

e. On October 13, 1983, counsel for the Petitioner wrote Judge Hughes, advising him of the position of Respondent and requesting a hearing by Judge Hughes, pointing out that the Hearing on the Motion needed to be held prior to October 25, 1983.

f. The trial of the case in question occurred in Dona Ana County, New Mexico, but was heard by Judge

Hughes from Luna County, New Mexico, upon the recusal or disqualification of the Third Judicial District Judges.

g. In addition to the written letters hereinabove referred to, attorney for the Petitioner communicated on several occasions with the secretary for Judge Hughes attempting to arrange a hearing or telephone conference hearing to resolve the Motion, however, no hearing date, convenient to the Court and Respondent could be arranged. Counsel for Petitioner was available at the Court's convenience for such a hearing at all material times.

h. Counsel for Petitioner attempted to contact Judge Hughes' office on October 25, only to learn that he had left town on vacation or business and would be unavailable until later in November.

i. Petitioner's attorney then wrote to Judge Hughes on October 27 requesting a hearing upon the Judge's return to his office following his vacation or business trip.

j. During pertinent times, Judge Hughes, according to his secretary, was unavailable due to trial commitments in Deming, Silver City and Lordsburg, N.M. Petitioner's trial took place in Las Cruces, N.M.

k. A conference call was finally had with all parties and the Court on November 14, 1983, pursuant to which the Court entered an Order Extending the Time for Appeal and according to the extension of time set forth in said Order, Petitioner's Notice of Appeal was timely filed.

l. Apparently in November of 1982, the New Mexico Supreme Court adopted Rule 202 N.M.S.A. 1978, Crim. Child. Ct., Dom. Rel. and WW/C App. R202(a) (Repl.

Pamp. 1983). Publication of these rules was not made by the publishing company until they were shipped in August of 1983. At the time of the conclusion of this case, counsel for Petitioner was unaware of the revision of the rules reducing the time within which to appeal from thirty days to the ten days in Rule 202. Oversight of counsel was discovered fifteen days following the entry of the Final Decree herein and the Motion to Extend the Time was promptly filed and diligent efforts were made by counsel for Petitioner to obtain a hearing or other resolution of that Motion including two written requests to the Court requesting a hearing.

m. This matter arose within approximately three months following the effective date of the revised rule.

n. Counsel for Petitioner, despite diligent efforts to obtain a hearing, because of conflicts in the District Court's schedule and Respondent's, was unable to obtain a hearing or an Order Extending the Time Within Which to Appeal. The District Court's issuance of the Order of November 14, 1983, Extending the Time, demonstrates the Court's determination that the Motion to Extend Time was well taken, consequently Petitioner has been deprived of his right of appeal and of due process of law resulting not only from the oversight of his attorney but also from the failure of the system to accommodate the requests for hearing of Petitioner. Judge Hughes failed to act upon a pending Motion within forty-five days from the date of its filing and, in spite of two written requests for a hearing and the efforts of counsel for Petitioner by telephone to arrange a hearing and/or conference call, no decision was forthcoming until the 60th day following judgment.

It is urged that the Petitioner has no recourse from the refusal or inability of the District Court to act upon a timely filed Motion for Extension of Time.

REASONS FOR GRANTING THE WRIT

Both the Court of Appeals and the New Mexico Supreme Court misapplied statutes to the present case. The Court of Appeals inappropriately applied Rule 202. The New Mexico Supreme Court inappropriately applied the January 1, 1983 amendment to Rule 3 (f). Neither the Court of Appeals nor the New mexico Supreme Court acknowledge the decision made by Judge Hughes on the 60th day to Extend the Time for filing the appeal.

Petitioner's Motion to Enlarge the Time allowed for filing a Motion for Rehearing and Motion for Rehearing were denied by the Supreme Court of the State of New Mexico on July 13, 1984. Unless the Supreme Court of the United States grants a Writ of Certiorari, Petitioner will be without any legal recourse from the negligence of a District Judge in not hearing a Motion to Extend Time within forty-five (45) days from the date the motion was filed.

The U.S. Supreme Court in National Association for the Advancement of Colored People v. Alabama ex. rel. Flowers, Ala (1964), 84 S Ct. 7302, 377 U.S. 288, 12 LED2d 325, on remand 167 S.O. 2d 171, 277 Ala 89, held that when the substance and form of State procedural rules were complied with, the U.S. Supreme Court was not barred from reviewing a brief which failed to conform to the letter of Alabama Supreme Court rules. In the present instance, efforts by Petitioner to obtain an appeal complied with the substance and form of New Mexico State Supreme Court procedural Rules, therefore Petitioner urges this court to grant a Writ of Certiorari to remedy an injustice created by the negligence, inability or refusal of a District Judge to timely hear a Motion for Extension of Time to File an Appeal. Furthermore, a Writ of Certiorari should be granted to allow proper application of Article IV, Section 34 of the New Mexico State Constitution to the present case.

CONCLUSION

WHEREFORE, Petitioner prays that a Writ of Certiorari issue from this Honorable court to review the judgment of the Supreme Court of New Mexico in S. Jeffrey Besser, Petitioner vs. Charlotte Greenfield, Respondent, No. 15279. In the event that Petition is granted, Petitioner prays that the Judgment of the Court Below be reversed, and that the appeal of Petitioner be allowed to proceed.

DATED June 17, 1984.

S. Jeffrey Besser
Petitioner
In Pro Per

818 Felspar
Ridgecrest,
California 93555
619/375-3592

APPENDICES

IN THE DISTRICT COURT OF
DONA ANA COUNTY, NEW MEXICO

CHARLOTTE GREENFIELD,	)	
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
S. JEFFREY BESSER,	)	
	)	
Respondent.	)	
	)	NO. DR 82-924

DECISION

THIS MATTER was tried on May 11 and 12, 1983 with some documentary evidence to be submitted later and arguments and briefs to be submitted as well as requested findings of fact and conclusions of law. This having been accomplished the Court enters its findings of fact and conclusions of law as follows:

FINDINGS OF FACT

(1) The parties were married October 15, 1971, in Colorado and have been since that date husband and wife.

(2) Both parties are residents of Dona Ana County, N.M., and have resided in the state for more than six (6) months immediately preceding the filing of this action.

(3) No children have born of the marriage and none is expected.

(4) The parties separated on or about April 18, 1982, due to discord between them and conflict of personalities

which has destroyed the legitimate ends of the marriage and there is no reasonable expectation of reconciliation.

(5) Petitioner is an attorney engaged in the private practice of law as a sole practitioner in Las Cruces, N.M., having received her law degree from the University of Michigan Law School in 1968, and being admitted to practice and having practiced in New York and Colorado in addition to New Mexico.

(6) Respondent is a certified Psychologist and is employed by a mental health center and also engaged in private practice as a counseling clinical Psychologist in Las Cruces, N.M., having received his doctorate degree from Colorado State University in 1978; in addition, respondent has a law degree from the University of Michigan Law School in 1969, but has not practiced law nor admitted to practice.

(7) Both parties are in good health and able to provide for themselves without assistance from the other.

(8) Prior to their marriage the parties cohabited for approximately two (2) years during which time they kept their earnings separately and shared living expenses as nearly equally as possible but maintained separate bank and saving accounts from which each paid his or her purchases and debts as made and created by them respectively.

(9) The marriage did not change this financial arrangement adhered to by the parties with each party maintaining separate bank and savings accounts which were not commingled with the joint funds and accounts, and neither party accounted to the other for dispursements made from their separate accounts.

(10) Each party acted with full knowledge and acquiescence of the other party maintaining separate accounts and the purchase of assets there from were considered the separate property of the one making the purchase.

(11) During the marriage petitioner inherited $14,000.00 which she did not commingle with joint funds from part of which she has acquired the Southwest Bell corporate bond and Municipal Fund shares.

(12) Considering funds transmuted into separate funds of each of the parties, and equitable division of their community and joint owned property is:

Petitioner should take as her separate property:

(a) The Hill property and assume and pay the mortgage lien indebted thereon;

(b) Two-thirds undivided interest in the Woodford property and assume and pay two-thirds of the expenses and mortgage lien indebtedness thereon;

(c) The household furnishings and related items of personal property located on the Hill property, subject to any indebtedness thereon;

(d) Two-thirds undivided interest in the furnishings and related items of personal property located on the Woodford property, subject to two-thirds of any expenses and indebtedness thereon;

(e) Her professional law practice and all related assets and obligations thereof;

(f) Bank and savings accounts in her name;

(g) Motor vehicles(s) in her possession; and

(h) Her personal clothing and effects.

Respondent should take as his separate property:

(a) The Van Patten property and assume the balance due on the purchase price;

'(b) One-third undivided interest in the Woodford property and assume and pay one-third of the expenses and mortgage lien indebtedness thereon;

(c) The household furnishings and related items of personal property located on the Van Patten property subject to any indebtedness thereon;

(d) One-third undivided interest in the furnishings and related items of personal property located on the Woodford property, subject to one-third of any expenses and indebtedness thereon;

(e) His professional psychology practice and all related assets and obligations thereof;

(f) Bank and savings accounts in his name;

(g) Motor vehicles in his possession; and

(h) His personal clothing and effects.

(13) Respondent attended school during much of the time the parties were married and during such times petitioner contributed to the joint account and joint support and living expenses in amounts considerably more than contributed by respondent.

(14) Respondent's doctorate did not enhance his ear-

ning capacity, and was of no value to the community.

(15) The 1982 income tax obligation should be paid or refunded in direct proportion to their respective reportable income and each receive credit toward his or her prorate portion for taxes he or she has paid.

(16) No rentals are due from one party to the other use of the residences during their separation.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the cause of action.

2. Petitioner is entitled to a divorce on the grounds of incompatibility.

3. Even though petitioner worked and helped support respondent during a considerable portion of the marriage while he attended school, does not entitle her to alimony as a means of reimbursement or pay back for her monetary contributions for his benefit.

4. The Southwest Bell corporate stock and Municipal Fund shares are petitioner's separate property.

5. The earnings of both parties during the marriage going into their separate accounts was by implied agreement transmuted into the separate funds of the respective parties.

6. The bank and savings accounts of each party in his or her name separately is the separate property of that party respectively.

7. The funds of petitioner inherited during marriage are her separate property.

8. It is proper to consider the separate funds of petitioner and the transmuted funds and property of each of the parties in making a division of their properties, and after considering same an equitable division between them is as set forth above, and each of the parties should execute and deliver all instruments necessary and proper to effect the foregoing division of their properties.

9. Each of the parties should pay his and her own attorneys fees and costs of this action.

10. All requested findings of fact and conclusion of law inconsistant with the above are hereby refused.

DATED this 8th day of August, 1983.

RAY HUGHES
DISTRICT JUDGE
DIVISION II

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

CHARLOTTE GREENFIELD,

Petitioner-Appellee,

vs. No. 7531

S. JEFFREY BESSER,

Respondent-Appellant.

APPEAL FROM THE DISTRICT COURT
OF DONA ANA COUNTY

Ray Hughes, Judge

Charlotte Greenfield
Atkinson & Kelsey
Albuquerque, New Mexico

Attorneys for Petitioner-Appellee

E. H. Williams
Las Cruces, New Mexico

Attorney for Respondent-Appellant

MEMORANDUM OPINION

NEAL, Judge

Husband appeals a decree of dissolution entered on September 15, 1983. We calendared the case for summary dismissal. Husband has filed a timely memorandum in opposition. Not being persuaded that husband's notice of appeal was timely filed, we dismiss this appeal.

A notice of appeal must be filed within ten (10) days after the filing of the order appealed from. NMSA 1978, Crim.,Child.Ct.,Dom.Rel.&W/Civ.App.Rule 202(a) (Repl.Pamp. 1983) In the event that the trial court entertains a motion for extension of time within which to file a notice of appeal, "[n]o motion for an extension of time to file a notice of appeal may be granted after forty days from the time the appealable order is entered." This rule is applicable to appeals of final orders entered on or after June 17, 1983, in matters concerning dissolution of marriage. NMSA 1978, Crim.,Child.Ct.,Dom.Rel. & W/C App.R. 101(C) (Repl.Pamp.1983). See also 22 S.B.B. 495. Thus, regardless of the circumstances which led to the trial court's failure to enter an order extending time within which to file a notice of appeal within forty days from the date of the judgement appealed from, this Court is without jurisdiction to hear this appeal because of husband's failure to file a timely notice of appeal. State v. Martinez, 84 N.M. 766, 508 P.2d 36 (Ct.App. 1973); Rice v. Gonzales, 79 N.M. 377, 444 P.2d 288 (1968).

Therefore, this appeal is dismissed.

IT IS SO ORDERED.

C. Fincher Neal, Judge

WE CONCUR:

Mary C. Walters, Chief Judge

Joe W. Wood, Judge

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

ARNOLD STONE,

Petitioner,

vs. No. 15,159

KATHERINE STONE,

Respondent.

PORFIRIO MENDOZA,

Petitioner,

vs. No. 15,241

LUPE A. MENDOZA (URBAN),

Respondent.

S. JEFFREY BESSER,

Petitioner,

vs. No. 15,279

CHARLOTTE GREENFIELD,

Respondent.

ORIGINAL PROCEEDINGS ON CERTIORARI

DECISION

STOWERS, Justice.

Three petitions on writs of certiorari are before this Court to review the decisions and orders of the Court of

Appeals. Due to the similarity of the issues raised, the three petitions have been consolidated. The Court of Appeals dismissed the appeals on the basis of NMSA 1978, Crim., Child. Ct., Dom.Rel. & W/C App. Rules 101(a) and 202(a) (Repl.Pamp.1983). We reverse the Court of Appeals as to Stone v. Stone, Ct.App. No. 7382 (Filed September 23, 1983) and Mendoza v. Mendoza, Ct.App. No. 7461 (Filed November 15, 1983). The writ of certiorari heretofore issued in Greenfield v. Besser, Ct.App. No. 7531 (Filed December 20, 1983) is quashed.

The issue presented by all three cases on certiorari concerns the applicability of the newly revised Crim.,Child.Ct.,Dom.Rel. & W/C App. Rules 101(a) and 202(a) and whether the application of the Rules to the facts in the three cases before us constitutes a violation of N.M. Const. Article IV, Section 34.

In Stone v. Stone, husband filed a petition to reduce alimony on October 19, 1982. On July 20, 1983, the district court denied the petition and also filed its findings of fact and conclusions of law. Husband filed a notice of appeal with the Court of Appeals on August 18, 1983. Wife filed a notice of cross-appeal on August 29, 1983. Wife subsequently filed a motion to dismiss with the Court of Appeals, arguing that husband should have filed his notice of appeal under Crim., Child. Ct., Dom. Rel. & W/C App. Rule 202(a). Wife's motion to dismiss was granted.

The second case, Mendoza v. Mendoza, concerned a motion for a partition of property. In Mendoza, a petition for dissolution of marriage was filed in 1974. Judgment was entered on July 18, 1984 dissolving the marriage and granting the community real property to the parties as tenants in common. In 1981, a motion was filed for a partition of the property. A hearing on the motion was held on May 11, 1983. Findings of fact and conclusions of law

were filed and an order for partition was entered on August 23, 1983. The notice of appeal was filed on September 22, 1983. The Court of Appeals proposed summary dismissal because the notice of appeal was not filed within ten days of entry of the district court's decision. A memorandum in opposition to summary dismissal was filed; however, the Court of Appeals subsequently entered its order dismissing the appeal.

Greenfield v. Besser also concerns the timeliness of a notice of appeal and in particular an order extending the time within which to appeal. In Greenfield, the wife filed a petition for dissolution of marriage on September 29, 1982. A final decree of divorce was filed on September 15, 1983. The record indicates that the husband filed a motion for extension of time within which to file an appeal on October 3, 1983. After numerous attempts to schedule a hearing or conference call to decide the issues raised by the motion, a conference call hearing was held on November 14, 1983. On November 15, 1983, the trial court extended the time for husband to file his notice of appeal to November 18, 1983. The notice of appeal was subsequently filed on November 18, 1983. The Court of Appeals calendared the case for summary dismissal. Husband filed a timely memorandum in opposition. However, not being persuaded that husband's notice of appeal was timely filed, the Court of Appeals dismissed the case.

On April 15, 1983, this Court revised Rule 101 and ordered that the amendment of Rule 101 "shall be effective for all appeals from orders or judgements entered on or after June 17, 1983." See 22 SBB 495. The revisions of Rule 101 expanded the scope of the rules of appellate procedure, making them applicable to domestic relations matters as well as other types of cases. Consequently, because of the expanded scope of the Rules, Rule 202 became the rule to be followed regarding time for filing the notice of appeal in domestic relations cases rather

than NMSA 1978, Civ.App. Rule 3 (Cum.Supp.1983). Rule 202(a) requires that the notice of appeal shall be filed within 10 days after the filing of the judgment or order appealed from. Civ.App. Rule 3(a) requires an aggrieved party to file their appeal within thirty days.

The petitioners in Stone and Mendoza contend that N.M. Const. Article IV, Section 34 prohibits the change of rules of procedure in pending cases. Article IV, Section 34 states:

> No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case.

The intention of Article IV, Section 34 was discussed in Stockard v. Hamilton, 25 N.M. 240, 180 P. 294 (1919). In Stockard, it was noted that the intention of the constitutional provision was to prevent legislative interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the State. The purpose of the provision was to cure past methods of winning cases by changing rules of evidence and procedure during the case.

Although Stockard discussed the constitutional provision as it applies to legislative enactments, State v. Hall, 40 N.M. 128, 55 P.2d 740 (1935) implied that the Court regarded rule changes in a pending case to be similarly prohibited by the Consitution. We have subsequently held that the provision also applies to rules adopted by this Court. Marquez v. Wylie, 78 N.M. 544, 434 P.2d 69 (1967). See also State v. Gallegos, 91 N.M. 107, 570 P.2d 938 (Ct.App.1977); State v. DeBaca, 90 N.M. 806, 568 P.2d 1252 (Ct.App.1977).

This Court has previously considered the issue of the applicability of a changed rule of procedure to actions or proceedings pending when the rule went into effect. In Sitta v. Zinn, 77 N.M. 146, 420 P.2d 131 (1966), the Legislature amended a rule of civil procedure to extend from two to three years the time for taking action to bring a proceeding to final determination. This Court held that the amended rule of civil procedure was not applicable to an action pending at the time of the effective date of the amendment. The Court concluded that the action was therefore subject to dismissal for failure to bring it to final determination within two years. See also Southwest Underwriters v. Montoya, 80 N.M. 107, 452 P.2d 176 (1969).

A change in judicial rules was discused in Marquez v. Wylie. The rule change as applied to that case had the effect of extending the time for filing a motion for new trial from ten to twelve days. Appellants in that case argued that the change of rules is not a "change in procedure." Noting that such an argument was fallacious, the Court stated that "the court could no more extend the time for the filing of a motion for new trial in a pending case than it could shorten the time." Marquez v. Wylie at 546, 434 P.2d at 71. The Court concluded that this was a change in procedure and was prohibited by the constitutional provision.

Similarly, in the three cases before us, the rule change has the effect of shortening the time for appeal from thirty days to ten days, and is therefore a change in procedure. Because the facts of the cases indicate that they were pending cases before the effective date of the rule change, we must determine whether they were timely filed under Civ.App. Rul 3. In both Stone and Mendoza, the notices of appeal were filed within the Thirty (30) day period provided under Civ.App. Rule 3(a)

and were therefore timely. However, in Greenfield the time allowed for filing a notice of appeal had expired despite the three day extension. Under Civ.App. Rule 3(f), "[n]o motion for extension of time to file the notice of appeal may be granted after 60 days from the time the appealable order is entered." The appeal in Greenfield was not timely filed because the appealable order was entered on September 15, 1983, and the notice of appeal was filed on November 18, 1983, after the 60 day period had elapsed. This rule is to be strictly construed to prevent its progressive erosion to the point that attorneys will assume that they have 60 days within which to file the notice of appeal. Guess v. Gulf Insurance Co., 94 N.M. 139, 607 P.2d 1157 (1980).

We therefore reverse the Court of Appeals as to Stone and Mendoza and remand these cases to the Court of Appeals to consider the appeals. We hereby quash the writ of certiorari issued in Greenfield as having been improvidently granted.

This decision is not to be published or cited as precedent.

IT IS SO ORDERED.

HARRY E. STOWERS, JR., Justice

WE CONCUR:

WILLIAM R. FEDERICI, Chief Justice

DAN SOSA, JR., Senior Justice

WILLIAM RIORDAN, Justice

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Friday, July 13, 1984

No. 15,279

S. JEFFREY BESSER,

Petitioner,

vs.

CHARLOTTE GREENFIELD,

Respondent.

This matter coming on for consideration by the Court upon Motion for extension to file Motion for Rehearing, and Motion for Rehearing, and the Court having considered said motions and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion for extension to file Motion for Rehearing, and Motion for Rehearing are hereby denied.

ATTEST: A TRUE COPY

Clerk of the Supreme Court
of the State of New Mexico